Böckenförde, the state of emergency and Carl Schmitt: What Böckenförde learned from Schmitt – und what Schmittians should learn from Böckenförde

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1. “If one reads the work phenomenologically-analytically and not as normative theory, it is simply persuasive.” – Ernst-Wolfgang Böckenförde says this about Carl Schmitts “The Concept of the Political” (Der Begriff des Politischen) in a biographical Interview with Dietrich Gosewinkel. “How do you want to understand the political world today without the insight that the political can lead to enmity time and again? It doesn’t have to, but it can, and often does.” (p. 372; in English here; Kindle version here; original version here).

Böckenförde had told Schmitt that he considered Schmitt’s “most important work” not to be his “Constitutional Theory” (Verfassungslehre) but “The Concept of the Political”. As Böckenförde saw it, the work “has often been misunderstood,” but “essentially […] contains, which is clear if one reads it closely, a criteriological-phenomenological analysis and not a normative theory. And as such it is correct.” (p. 372): “It is astonishing how Carl Schmitt was able to describe this so grippingly in about seventy, eighty pages. Of course, in some places there are polemical accents, but that does not change the fact that I consider [the main insight] as simply fundamental.” (p. 379; cf. also here, pp. 598, 600, 605, but also p. 606).

The central thesis of Schmitt’s book is that the political is characterized by the friend-enemy-distinction, that strongest degree of intensity of association or dissociation that can lead to the willingness to kill the enemy.

It convinced Böckenförde as an analysis of a social phenomenon, a description of a fundamental fact of social reality, which had to be taken into account by the legal system: The democratic constitutional order, the freedom and equality of all – those ideas of Enlightenment of (1776 and) 1789, which Böckenförde, unlike Schmitt, unconditionally supported – could only be effectively secured and protected if the possibility of life-or-death enmity was factored in.

For Böckenförde, Schmitt’s analysis contained crucial insights, that unfortunately still hold true from a sociological point of view, and that a liberal democracy must not turn a blind eye to, if it is not to be swept away in the state of emergency by the dynamics of the friend-enemy opposition. Democracy has to prepare for this dynamic (realized time and again in history, in wars and civil wars as well as in the fight of

terrorist “partisans”), adapt to it and ensure that there is the ability to act in the event of such conflicts – without giving up its commitment to liberty.

2. Such lessons can be drawn from the book – “if” one reads it “phenomenologically-analytically and not as normative theory”, as Böckenförde emphasized.

Carl Schmitt’s “The Concept of the Political” certainly allows for the other, the normative reading as well, although Böckenförde considered it a misunderstanding. According to a normative reading, the existential fight of the community against the enemy takes precedence over all human rights.

The turn from the normative to the “existential”, after all, does not change the fact that Schmitt assigns the stronger force of guiding action to the existential self-assertion, when stating, for example, that “[t]he war, the willingness to die […], the physical killing […], all that” does have “no normative, but only an existential meaning”; that the physical annihilation of the enemy cannot be justified by norms, but is done “out of the existential assertion [seinsmäßige Behauptung] of one’s own form of being”, that it is “meaningful, but only politically meaningful” (here, p. 49 f.).

It does not matter whether one characterizes one’s self-assertion against the enemy as the highest normative command or as an existential necessity which cannot be captured in norms: one way or the other one privileges fighting over passivity, attributes a higher existential significance to militant action than to respect for the enemy’s humanity.

Moreover, elsewhere Schmitt uses normative terms as well, for example, when he speaks of a state’s "immense authority [Befugnis]” to “openly dispose of the lives of people during the war” (p. 36), or of the “elementary rightness” of the “axiom of protection and obedience” according to which the patron determines the enemy (p. 54).

It also fits a normative interpretation that Schmitt glorifies the state murderings after the so-called “Roehm Putsch” as the leader’s deed, in 1934, in his “The Fuehrer protects the law”, and says that they were “not the action of a republican dictator” who “creates facts in a law-free zone”, but a “genuine exercise of judicial power” (“echte Gerichtsbarkeit”) springing from “the same source of law,” from which all rights of every nation arise: “In the highest emergency the highest law proves itself […]. All law comes from the right of the people to live.” (here, pp. 200-201).

In the 19th century, Schmitt explaines, Dufour “defined the act of government, eluding any judicial review”, as aiming at defending society against its enemies; but in a “leader state” (Fuehrerstaat) that which is otherwise lawful as an ‘act of government’ has to be so “to an incomparably greater extent” as a deed “by which the leader has proven his supreme leadership and jurisdiction” (pp. 201-202).

3. Regardless of whether or not a normative understanding does justice to Schmitt exegetically – it definitely helped boost Schmitt’s international reception after the terrorist attacks of September 11, 2001.

A Schmittian doctrine that qualifies the fight of a polity against its enemies as an existential necessity trumping any legal objections was right on cue to serve as a justification for declaring a "war on terror", discarding all legal constraints and arresting and torturing terrorism suspects in Guantanamo and other prisons without judicial review or interference.

As Quinta Jurecic pointed out, "[f]ew of the many unexpected intellectual twists and turns of the early post-9/11 years […] were quite so unexpected – or quite so twisty and turny – as the sudden return to prominence of […] Carl Schmitt".

4. At Harvard Law School, Adrian Vermeule has been reviving Schmitt for quite some time now, prominently including his teachings on the state of emergency.

In „Our Schmittian Administrative Law" (Harv. L. Rev. 122 [2009], 1096]), Vermeule explaines that the administrative law of the United States necessarily contains legal "black holes" and "gray holes", because – according to Vermeule – Schmitt's empirical and institutional insight is correct that, because of their unpredictable circumstances, "[e]mergencies cannot realistically be governed by ex ante, highly specified rules" (pp. 1099-1106, see also pp. 1136, on other countries). One example for this is supposed to be the judicial review of detentions in Guantanamo and other anti-terrorist prisons (pp. 1133-1134).

Like Schmitt (and unlike Böckenförde), Vermeule artfully combines neutral analysis with ultimately normative conclusions that lead to a supremacy of national security over individuals and their rights – acting as an explosive device for the liberal constitutional order – which is at least carried along by ambivalent formulations. Fundamental rights, after all, cannot create any barriers to something which is empirically or institutionally unavoidable: impossibilium nulla est obligatio.

To wit, Vermeule has recently identified Alexander Hamilton (and James Madison) as forerunners of such Schmittian insights (perhaps responding to advice "to toss out Schmitt" from his theory). According to Vermeule, Hamilton and Madison have (as Publius) identified "a dynamic or mechanism, the 'Publius Paradox', that warrants great attention": "If the bonds of constitutionalism are drawn too tightly, they will be thrown off altogether when circumstances warrant." (The Publius Paradox, Modern L. Rev. 82 (2019), 1 [1]). "A polity", Vermeule points out, "will defend itself according to the pragmatic imperatives of natural circumstances, whatever law might say" (p. 4). Although Vermeule is consulting the Founding Fathers now, homage is paid to Schmitt as well – by quoting Donoso Cortes instead (who was so important to Schmitt) (p. 11 n. 34).

As in Schmitt's case, one has to (partly) agree with Vermeule's astute observations – and disagree with their normative suggestions and undercurrents. It can hardly be denied that in a state of emergency legal scruples can (and often do) disappear all to easily. However, a democracy can fight against terrorist enemies while still adhering to legal rules like the right to habeas corpus review or the prohibition of torture. Neither the character of such rules as "ex ante" and "highly specified" nor the "Publius paradox", according to which legal shackles drawn "too tightly" will be thrown off, rule this out.

5. Böckenförde's concern with Schmitt's insights was always to salvage them for liberal democracy, to shift them towards the rule of law and to put that in them which is worth preserving to good use for a constitutional order of liberty and equality. He considered it one of his main successes as a scholar "to have given Carl Schmitt's concepts a liberal reception" ("Carl Schmittsche Begriffe liberal rezipiert zu haben"); see here, p. 486.

This holds true, for example, for the distribution principle of the rule of law (rechtsstaatliches Verteilungsprinzip) according to which a citizen does not have to justify exercising her liberty, but government has to justify restricting it. It holds true, as well, for Schmitt's idea that "the power to amend and supplement the Constitution can not be limitless and has not been conferred in order to eliminate the Constitution itself" (Verfassungslehre, 1928, p. 106). Böckenförde rightly considered this idea to be as "in substance […] incorporated" into the German Constitution through Article 79 (3)" (see here, p. 378); an idea for which Schmitt himself referred to William L. Marbury (The Limitations upon the Amending Power, in: Harvard L. Rev. 33 [1919/1920], pp. 223 et seq.; see p. 225: "It may be safely premised that the power to 'amend' the Constitution was not intended to include the power to destroy it.").

6. And it also holds true for Böckenfördes reception of Schmitt's insights about the possibility of a confrontation with an enemy and a resulting state of emergency.

To be better prepared for this possibility, Böckenförde suggested amending the Constutition to include stronger and more effective emergency regulations. However, according to his proposal for a general emergency power (de constitutione ferenda), the principles of human dignity, the acknowledgement of unalienable human rights as the basis of every polity in Article 1(2) of the Constitution as well as other fundamental rights should "under no circumstances be derogated" (cf. Ausnahmerecht und demokratischer Rechtsstaat, in: Vogel/Simon/Podlech [ed.], Die Freiheit des Anderen – Festschrift für Martin Hirsch, 1981, S. 259 [268-270], Art. Y Abs. 3).

In a state of emergency, according to Böckenförde, an exception-proof minimum of fundamental rights should still be in force, "outermost limits, comparable to the principles of Articles 1 and 20" of the German Constitution, should remain insurmountable (Der verdrängte Ausnahmezustand, in: NJW 1978, S. 1881 [1890]; for the doctrine of a balancing-proof "essence of dignity" [or "core of dignity", Menschenwürdekern] of fundamental rights, following from Article 1 of the Constition according to the German Constitutional Court's longstanding case law cf. Hong, EuConst 12 [2016], p. 549 [pp. 558-560], and here).

The state of emergency, for Böckenförde, was "not a blank cheque for arbitrary actions not bound by any legal limit", but was supposed to be "a clear-cut and contained legal institution" (Die Krise der Rechtsordnung: der Ausnahmezustand, in: Michalski (ed.), Über die Krise, 1986, p. 183 [188]).

Böckenförde was accordingly convinced as well that provisions of criminal law or the concept of a "supra-legal emergency" (übergesetzlicher Notstand) could not grant any powers that the special provisions of public law, especially constitutional law,

precluded (NJW 1978, p 1881 [1882-1884]) – a question, which later writings by Gertrude Lübbe Wolff (Rechtsstaat und Ausnahmerecht – Zur Diskussion über die Reichweite des § 34 StGB und über die Notwendigkeit einer verfassungsrechtlichen Regelung des Ausnahmezustandes, in: Zeitschrift für Parlamentsfragen 11 [1980], p. 110 [111-117]) "answered once and for all", in Böckenförde's opinion: "Whoever wants to refute her will break their doctrinal teeth trying [wird sich daran die juristisch-dogmatischen Zähne ausbeißen]" (Rechtsstaat und Ausnahmerecht – Eine Erwiderung, in: Zeitschrift für Parlamentsfragen 11 [1980], p. 591 [592]).

7. Schmittians should learn from Böckenförde, therefore, that Schmitt's writings do not support the claim that in a state of emergency any specific legal limits will necessarily be ineffective.

Whenever Carl Schmitt is discussed, Böckenförde's reading of him should be taken into account. Although Böckenförde resisted being labelled (by Mehring) Schmitt's "star student" ("Meisterschüler") for good reasons (see again here, p. 391: If this would have "the connotation that" one "has fully embraced" Schmitt, "then I would say no, I was not a star student.") – he was probably more intimately acquainted with Schmitt's views than any other German scholar of constitutional law, due to his intensive personal exchanges with Schmitt (which makes it a quite irritating experience to see, for example, Vermeule's reaction to Ralf Michaels' recommendation to take Böckenförde's writings into account when drawing on Schmitt's critique of liberalism).

If Böckenförde saw no obstacles to upholding a minimum of fundamental rights in a state of emergency in Schmitt's analysis, this should give pause to anyone who reads Schmitt differently.

At the memorial service for Ernst-Wolfgang Böckenförde on March 9, 2019, Johannes Masing remarked that in his third semester, in 1980, attending Böckenförde's seminar made him feel sure for the first time that his choice to study law had been the right one. Bernhard Schlink said that as a listless student he was captivated by Böckenförde's teaching in a course in 1966/1967, and that Böckenförde went on to become a "teacher of the Federal Republic" of Germany. Schlink pointed out that he did not know anybody as successful, who had stayed that modest. He recounted that when Böckenförde was awarded the Sigmund Freud Prize for scholarly prose, he announced in his speech that, before the award, he had not read anything by Freud.

No one who, like Böckenförde, puts the strength of the arguments front and center, should ignore his contributions to constitutional doctrine. Fortunately, a first volume of his writings has been published in English at Oxford University Press (a second one is announced, see also the Special Issue of the German Law Journal of 2018 here), which has been rightly praised by Bruce Ackerman, Kim Lane Scheppele and J.H.H. Weiler (here, under "Reviews"): "It is past time for the English-speaking world to fully confront his remarkable contributions to modern constitutionalism." His writings "should be read by everyone with interests at the intersection of constitutional and political theory", because: "Böckenförde falls into the rare category of indispensable scholarship."